IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 18.12.2006

THE HONOURABLE MR.JUSTICE P.JYOTHIMANI

W.P.No.30983 of 2006

Dr.K.N.Parimelazhagar ... Petitioner

Vs.

1. The Secretary to Government,
Health & Family Welfare Department,
Fort St.George,
Chennai-9.

2. The Director of Medical Education,
Kilpauk,
Chennai-10.

... Respondents

PRAYER: This writ petition is filed under Article 226 of the Constitution of India to issue of writ of mandamus, directing the respondents to superannuate the petitioner from service and also further direct the respondents to settle all the retirement benefits within a reasonable time.

For Petitioner : Mr. K.Venkataramani
For Respondents : Mr. Gopiraja, G.A.

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O R D E R

The petitioner was appointed Assistant Surgeon in Tamil Nadu Health Services on 11.04.1969, through a selection conducted by the Tamil Nadu Public Service Commission. He is a M.S. Degree holder in surgery and also got M.C.H. He was promoted as a Reader in the year 1986 and then made Head of the Department and served in the said capacity till his date of superannuation on 30.04.2001. When he was due to retire on 30.04.2001, the petitioner was served with an order of suspension, stating that an enquiry into grave charge against him is pending. The charge stated in the suspension was that he has played an active role in irregular purchase of 10000 plastic gun ties instead of 100 numbers, which are required. The petitioner has approached the Tamil Nadu Administrative Tribunal by filing O.A.No.3451 of 2001 and 3457 of 2001, challenging the order of suspension, as also another order passed by the respondent in not

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allowing the petitioner to retire from service issued by the first respondent in G.O.Ms.No.621 Health and Family Welfare Department and also G.O.Ms.No.622 Health and Family Welfare Department dated 30.04.2001. The Tribunal by disposing many of the similar cases has ordered by upholding the validity of the order of suspension and directing the department to take steps, to dispose of all the disciplinary proceedings and also take steps to bring the criminal cases to an end. That was the order passed by the Tribunal on 26.08.2002. It was as against the said order of the Tamil Nadu Administrative Tribunal, the petitioner has approached this Court by filing W.P.No.29689 and 29890 of 2004. The Division Bench of this Court while disposing of the writ petition, by an order dated 05.04.2005, having found that there is a total violation of principles of all norms of justice, has set aside the order of suspension, as well as the order not allowing the petitioner to retire dated 30.04.2001. The operative portion of the order of the Division Bench is as follows:

> "Having regard to the above facts, we are of the considered opinion that to keep the petitioner in mental agony by not allowing him to retire, though four years have elapsed since 30.04.2001, is in violation of the principles of all norms of justice and service jurisprudence. Therefore, solely on the ground of total inaction on the part of the disciplinary authority/Government in taking follow up action on the irregularity stated to have been found out, sometime in April, 2001, we are inclined to allow both the writ petitions and quash the orders dated 30.04.2001, one by which the writ petitioner was placed under suspension and the other by which, the writ petitioner was denied permission to retire on he attaining the age of superannuation. Consequently, the orders of the Tribunal challenged in these writ petitions are set aside and the writ petitions are allowed. We make it clear that our todays' order would not come in the way of the Government/disciplinary authority, if at a later point of time, it decides to take any action against the Government servant on the materials made available to them. Consequently, the connected W.P.M.P.is closed. No Costs."

2. The Division Bench has also found on fact from the counter affidavit of the respondents that there was no departmental action or disciplinary proceeding initiated against the petitioners and there was no criminal action against the petitioner. The observation made by the Hon'ble Division Bench of this Court as follows:

> "3. Having regard to the limited point projected before us by Mr.K.Venkataramani to have the orders impugned

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before the Tribunal quashed, when we went though the counter affidavit of the Government we find that there is absolutely no answer. The counter affidavit is totally silent as to what departmental action the disciplinary authority had taken or is inclined to take and at what stage the preliminary enquiry conducted by the Vigilance and Anti Corruption Department is, as on date. In other words, the counter affidavit does not even disclose that a crime had been registered against the writ petitioner and others in respect of the above referred to irregularity. Thus the case of the learned counsel appearing for the writ petitioner is that, till date not even a crime had been registered against him, stands not controverted."

3. It is also not in dispute that even as on date, there was no departmental proceedings initiated against the petitioner.

4. It is the case of the petitioner that while the petitioner has ordered the supply of 100 plastic gun ties, the office of Dean has written it as hundred boxes, which mean 10,000 and therefore, there was no fault on the part of the petitioner at all.

5. It is also the further case of the petitioner that on finding the mistake and at the instance of the petitioner the supplier was directed to take back the excess supplied and the amount was also returned back and therefore, no loss caused to the Government. It is probably due to these reasons, the respondents have not taken any action against the petitioner, either departmentally or otherwise. However, having suffered an order, as stated by the Division Bench of this Court, setting aside the order of suspension, as well as the order not allowing the petitioner to retire from service on 30.04.2001, it is astonishing to note that the petitioner has not been allowed to retire even as on today, namely, even after 1½ years after the order of the Division Bench, which necessitated the petitioner to approach this Court by filing the present writ petition, for a direction against the respondents to superannuate the petitioner from service and also to settle all his retirement benefits.

6. The petitioner's case as seen from the record is that the petitioner is one of the eminent surgeon and due to the non implementation of the order of the Division Bench, he is unable to lend his services to other institutions to use his professional knowledge, apart from the fact that the petitioner is unable to have the settlement of his pensionary benefits.

7. Mr.Venkataramani, learned counsel appearing for the petitioner would submit that when once the Division Bench has come to

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a conclusion by setting aside the order of suspension and the order not allowing the petitioner to retire from service and in the factual situation that there is no disciplinary proceedings pending against the petitioner, there is absolutely no reason for the respondents in not allowing the petitioner to retire from service. He would also submit that in spite of the Division Bench finding that there is a total violation of the principles of all norms of justice, even after the lapse of 1½ year, the injustice perpetuated. It is not only against the interest of the petitioner, since it is monetary loss, but also against the concept of justice at large. Since the petitioner being an eminent surgeon, due to the reason that the petitioner is not allowed to retire, the petitioner is unable to take up any other work connected with his medical profession.

8. On the other hand, the learned Government Advocate Mr.Gopiraja appearing for the respondents would submit that the charges leveled against the petitioner and other persons are serious in nature. Even though the petitioner is an eminent surgeon and he has attained the age of superannuation, the Government should be permitted to proceed with the disciplinary proceedings. He would also submit that as per the pension rules, a direction may be given to the Government to proceed against the petitioner.

9. I have carefully considered the submissions made by the learned counsel for the petitioner as well as the vehement contention raised on behalf of the learned Government Advocate.

10. On the face the entire facts and circumstances of the case, I have absolutely no hesitation to come to the conclusion that it is the case of gross injustice done, not only to the petitioner but also to the interest of society. I am emboldened to say this because admittedly, as on date, no disciplinary proceedings have been initiated against the petitioner and no other cases were pending against him. In fact, it is relevant to point out at this juncture that the Tamil Nadu Administrative Tribunal while disposing of batch of cases, has directed that the disciplinary proceedings can be initiated. That was the order passed on 26.08.2002. At this point of time, even after 1½ year from the date of the order passed by the Division Bench of this Court it is too late for the respondents to state that they may be permitted to proceed with the disciplinary proceedings after allowing the petitioner to retire from service.

11. In any event as far as the prayer in this writ petition allowing the petitioner to retire on superannuation, there is absolutely no defence on the part of the respondents at all, for, the matter which has already been settled by the order of the Division Bench of this Court. While so, it is only consequential that the petitioner should be paid all the monetary and other benefits due to

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retirement.

12. As far as the contention raised by the learned Government Advocate in respect of the pension rules, as rightly pointed out by the learned counsel for the petitioner, if at all any provision that may be made applicable in respect of this case, the same will be under Rule 9 of the Tamil Nadu Pension Rules, 1978. A reading of Rule 9 shows that in cases where a departmental or disciplinary proceedings is pending against a government servants, the Government can reserve its rights to proceed with the departmental proceedings by withholding or withdrawing a pension. Rule 9(2) contemplates that in cases which are covered under Rule 9(1), which means, in cases where the departmental or disciplinary proceedings against a government servant is pending, the proceedings can be continued and concluded by the authorities by which they were commenced in the same manner, as if the government servant has continued in service.

13. It is also relevant to point out that under Rule 9(2), there is a power with the sanction of the Government to institute fresh proceedings even after the retirement, provided event complained of has taken place within 4 years before the institution. The relevant portion of Rule 9(1) and 9(2) are extracted for the proper appreciation of the entire legal position as such under the Pension rule are as follows:

"9. Right of Government to withhold or withdraw pension.-

(1)(a) The Government reserve to themselves the right of withholding or withdrawing a pension or part thereof, whether permanently or for a specified period if, in any departmental or judicial proceeding, the petitioner is found guilty of grave misconduct or negligence during the period of his service, including service rendered upon reemployment after retirement, and such withholding or withdrawing the pension may be effected irrespective of the fact whether or not any pecuniary loss on account of such grave misconduct or negligence was caused to the Government, to any local body or to any co-operative society comprising of government servants and registered under the Tamil Nadu Co-operative Societies Act, 1961;
(Provided that before passing an order under this sub-rule withholding or withdrawing the pension of a pensioner, the Tamil Nadu Public Service Commission shall be consulted if the pensioner does not agree to such withholding or withdrawal of the pension. The Tamil Nadu Public Service Commission need not be consulted in cases where the pensioner agrees to withholding or withdrawal of the pension but a copy of the order passed by the Government in

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such cases shall be sent to the commission:)
Provided further that where a part of pension is withheld or withdrawn, the amount of such pension shall not be reduced below the limit specified in sub-rule (5) of Rule 43.
(b) In case there is any pecuniary loss caused to the Government, to any local body or to any co-operative society comprising of Government servants and registered under the Tamil Nadu Co-operative Societies Act, 1961, and if, in any departmental or Judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service including service rendered upon re-employment after retirement, the Government shall also have the right of ordering recovery from the pension (or Death-cum-Retirement Gratuity) of the whole or part of the pecuniary loss caused by such grave misconduct or negligence:
Provided that the Tamil Nadu Public Service Commission shall be consulted before any final orders under this clause are passed.
Explanation.- "Judicial proceeding" shall include proceedings before any Tribunal constituted by an Act of Parliament or the State Legislature or by a Rule.)

(2) (a) The departmental proceeding referred to in sub-rule (1), if instituted while the Government servant was in service, whether before his retirement or during his re-employment, shall, after the final retirement of the Government servant be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service:
Provided that where the departmental proceedings are instituted by an authority subordinate to the Government, that authority shall submit a report recording its findings to the Government.
(b) The departmental proceedings, if not instituted while the Government servant was in service, whether before his retirement or during his reemployment,-
(i) shall not be instituted save with the sanction of the Government;
(ii) shall not be in respect of any event which took place more than four years before such institution; and
(iii) shall be conducted by such authority and in such place as the Government may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service."

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14. Therefore, even in referring to the pension rules, the contention of the learned Government Advocate that the Government must be permitted to proceed with the enquiry, cannot be sustained. It is not only the fact that no disciplinary proceeding or enquiry is either initiated or pending against the petitioner but the subject matter of the purchase is of the year 1999, which is clearly 4 years before the retirement under the pension rule.

15. Therefore, looking into any angle there is absolutely no right on the part of the respondents to proceed with the petitioner. In view of the above said facts and circumstances and legal position especially taking into consideration the decision of the Division Bench of this Court as stated above, the writ petition stands allowed with a direction to the respondents to permit the petitioner to retire, to be superannuated forth with and settle all the pensionary and other benefits due to him, within a period of 8 weeks from the date of receipt of a copy of this order. No Costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

To
1. The Secretary to Government,
Health & Family Welfare Department,
Fort St.George,
Chennai-9.

2. The Director of Medical Education,
Kilpauk,
Chennai-10.

+1cc to Mr.K.Venkataramani,Advocate Sr 63668
+1cc to Govt.Pleader Sr 63578

SR (CO)
km/28.12.

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